Office-Supreme Court, U.S.
FILED
JUN 19 1969
JOHN F. DAVIS, CLERK

No. [redacted]

In the 261

Supreme Court of the United States

OCTOBER TERM, ~~19[redacted]~~ 1969

STATE OF MAINE, et al.,
APPELLANTS
v.
MICHAEL EDWARD SHONE,
APPELLEE
On Appeal From the United States Court
Of Appeals For the First Circuit

JURISDICTIONAL STATEMENT

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v.

MICHAEL EDWARD SHONE,

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On Appeal From the United States Court Of Appeals For the First Circuit

JURISDICTIONAL STATEMENT

Appellants appeal from the opinion of the United States Court of Appeals For the First Circuit entered on January 31, 1969, declaring a Maine statute unconstitutional which statute provided for the administrative transfer of incorrigible inmates from the Boys Training Center to the Mens Correctional Center (formerly the Reformatory for Men); and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS BELOW

The opinion of the Circuit Court of appeals for the First Circuit is reported in 406 F.2d 844. The opinion of the Federal District Court for the District of Maine

is reported in 286 F. Supp. 511. The opinion of the Supreme Judicial Court of Maine is reported in 237 A.2d 412. The opinion of the Superior Court is not reported. Copies of the reference opinions are attached hereto as Appendix B.

JURISDICTION

This Court has jurisdiction under Title 28, United States Code, Section 1254(2). Initially, Shone sought State post-conviction relief regarding his State administrative transfer to the Mens Correctional Center from the Boys Training Center. Both the State Superior Court and the Supreme Judicial Court of Maine decided that the State's transfer statute did not violate the Federal Constitution. Thereafter, Shone sought Federal Habeas Corpus relief pursuant to 28 U.S.C. § 2241, et seq. The Federal District Court decided that the Maine Statute was constitutional and Shone appealed to the Circuit Court of Appeals. The Circuit Court decided that Maine's administrative transfer statute, 15 Maine Revised Statutes Annotated § 2717, was unconstitutional, and it is that decision which is being appealed to this Court.

QUESTION PRESENTED

Does a state statute which provides for an ex-parte administrative determination of incorrigibility and transfer of an inmate from a juvenile training center to an adult correctional center violate the Due Process and Equal Protection Clauses of the Federal Constitution?

STATUTE INVOLVED

Section 2717 of Title 15 of the Maine Revised Statutes is set forth in Appendix A.

STATEMENT

On May 15, 1967, the petitioner appeared in the Ninth District Court of Maine, Division of Southern

Cumberland County, to participate in a juvenile proceeding entitled State of Maine v. Michael E. Shone, Juvenile Docket #117. As a result of that proceeding, the petitioner was found to have committed a juvenile offense; and he was sentenced to an indeterminate sentence at the Boys Training Center, South Portland, Maine. Pursuant to said sentence, the petitioner was placed in the custody of the Superintendent of the Boys Training Center on May 15, 1967.

On May 28, 1967, the petitioner was transferred from the Boys Training Center to the Maine State Mens Correctional Center, South Windham, Maine. The reference transfer was occasioned by resort to the procedure specified in 15 M.R.S.A. § 2717. (*Appendix A*) Specifically, the Superintendent of the Boys Training Center, on May 24, 1967, made the following notation upon the mittimus over his signature:

> "It is respectfully requested that the Superintendent be authorized to transfer Michael Shone to the Reformatory for Men in accordance with Title 15, chapter 409, section 2717 of the Maine Revised Statutes, Annotated, in that he is, in our best judgment, presently incorrigible to existing plant facilities and program."

Thereafter, on May 25, 1967, the Commissioner of Mental Health and Corrections, pursuant to the provisions of said section 2717 of the reference Maine Statute, entered the following notation upon Shone's mittimus over his signature:

> "Acting under the authority of Title 15, chapter 409, section 2717 of the Maine Revised Statutes, Annotated, the transfer of Michael Shone from the Boys Training Center to the Reformatory for Men is approved."

At this point, it is important to note that the petitioner was not attacking the juvenile court proceed-

ings which occurred in the Ninth District Court of Maine, Division of Southern Cumberland County, and that he was not claiming that the procedures followed by the Superintendent of the Boys Training Center and the Commissioner of Mental Health and Corrections were not in accordance with Maine Statutes.

The State Superior Court was first presented with this issue, and that Court decided the Maine transfer law was not repugnant to the Federal Constitution. (*Appendix* p. 38) The Court noted that *In the matter of Gault*, 387 U.S. 1, 87 S. Ct. 1428 (May, 1967) was not a decision calling for the destruction of Maine's transfer law. In fact, the Circuit Court of Appeals' decision does not rest on *In the matter of Gault*, supra. The Supreme Judicial Court of Maine affirmed the decision of the State Superior Court. (*Appendix p.* 28) In upholding the constitutionality of the reference statute, the State Appellate Court reviewed the existing decisions of other states that have examined this question and have sustained the validity of like transfer laws (because the possibility of transfer of an incorrigible inmate from one correctional center to another is an incident impliedly annexed to the original sentence). Here, Maine's transfer statute was in existence when Shone was first sentenced to the Boys Training Center in the State District Court. Maine's sister states of Colorado, Iowa, Kansas, Massachusetts, New Jersey, Rhode Island, Tennessee and Wyoming have upheld transfer statutes like the one struck down here by the Circuit Court of Appeals.

The Federal District Court's opinion, in this case, is of the same persuasion as that of the State Superior Court and the Supreme Judicial Court of Maine. (*Appendix* p. 19) The Federal District Court cited both State and Federal cases in support of its position that Maine's administrative inter-institutional transfer statute was constitutional.

The Circuit Court of Appeals has decided that the subject statute is unconstitutional, notwithstanding that no other state or Federal Court has yet so ruled.

The Federal District Court has stated the situation thusly:

> "Although the United States Supreme Court has not yet had occasion to pass upon the precise issue which petitioner here raises, the great weight of state and lower federal authority sustains statutes similar to the one here involved. (Citing cases)." (*Appendix* p. 22); parentheses mine.)

ARGUMENT

I.

The Question Is Substantial

1. The opinion of the Circuit Court of Appeals is in direct conflict with lower federal authority. Not a single Federal case involving inter-institutional transfer statutes like the one here in question is cited by the Circuit Court as authority for its position; yet Federal cases exist sustaining the validity of such legislation. *Clay v. Reid*, (D.D.C.) 173 F. Supp. 667, appeal dismissed 272 F.2d 527 (D.C. Cir. 1959); *Suarez* v. *Wilkinson*, (M.D. Pa. 1955) 133 F. Supp. 38; *Sonnenberg v. Markley*, (7th Cir. 1961) 289 F.2d 126; *Arkadiele v. Markley*, (S.D. Ind. 1960) 186 F. Supp. 586 and *Trimble v. Stone*, (D.D.C. 1960) 187 F. Supp. 483 (dictum). The Circuit Court of Appeals' opinion should be reviewed because it conflicts with the great weight of federal decisions on this subject.

2. The opinion of the Circuit Court of Appeals is contrary to the plural cases of the state courts that have upheld the constitutionality of inter-institutional transfer statutes similar to the one in Maine. Those state cases are as follows: *Wilson* v. *Coughlin*, Iowa, 147 NW2d 175 (1966); *Long v. Langlois*, R.I., 170 A2d 618 (1961); *People v. Scherbing*, Col. Dist. Ct. App., 209 P.2d 796 (1949); *Moffett v. Hudspeth*, Kan., 198 P.2d 153 (1948); *In re Robertson*, Del. Gen. Sess., 54 A.2d 848 (1947); *Uram v. Roach*, Wyo., 37 P.2d 792 (1934); *Sheehan Petitioner*, 254 Mass. 342

(1926); *In re Schiavone*, 183 N.Y.S. 884 (Sup. Ct. 1920); *Stagway v. Riker*, N.J. Sup., 86 A. 440 (1913); and *Cassidy, Petitioner*, 13 R.I. 143 (1880). Because these many state decisions do exist, the case is of general interest; and the Circuit Court of Appeals opinion should be reviewed on appeal.

3. The Circuit Court of Appeals has based its opinion on cases dealing with transfers of mentally defective persons from penal institutions to mental institutions; whereas the instant case involves the transfer of an incorrigible person from one correctional institution to another within the State. Thus, the cases of *Baxstrom v. Herold*, 383 U.S. 107 (1966); *Bolton v. Harris*, 395 F.2d 642 (C.A.D.C.) 1968; and *People ex rel. Goldfinger v. Johnston*, 53 Miss. 2d 949, 280 N.Y.S. 2d 304 (1967) are distinguishable and not controlling. The Circuit Court of Appeals' opinion, rested as it is on the above distinguishable authorities, and seemingly disregarding applicable state and federal cases should be reviewed on appeal.

4. The Circuit Court of Appeals has struck down specific Maine legislation, enacted as an exercise of the State's police power, through a misinterpretation of *Baxstrom v. Herold* supra and *Specht v. Patterson*, 386 U.S. 605 (1967). This Court held, in *Baxstrom*, that a procedure whereby an adult prisoner nearing the end of his sentence could be civilly committed for a period of time beyond the expiration of his prison term to a hospital for the criminally insane sans the judicial determination available to a person not in custody, was a deprivation of equal protection of the laws in violation of the Fourteenth Amendment. Whereas, *Baxstrom* involved an extension of the initial period of confinement by reason of the later commitment, the present case does not prolong the period of confinement one day. The difference between the present case and *Specht* is that the sentence under the sexual offender statute was a considerable enhancement of the maximum sentence for the crime of which Specht had in fact been convicted while in the present case the original commitment was not extended in any way by the transfer.

CONCLUSION

It is submitted that the decision of the Circuit Court of Appeals failed to recognize the applicable principles of case law already expressed by both State and Federal Courts involving transfer laws like the one in this case, and that the authorities cited by the Court are distinguishable and not controlling. We believe that the question presented by this appeal is substantial and that it is of general importance.

Respectfully submitted,

JOHN W. BENOIT, JR.
Counsel for Appellants
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Augusta, Maine

CERTIFICATE OF SERVICE

Pursuant to Rule 33 of the Supreme Court of the United States, the undersigned, counsel of record for the appellants, on the date written below, did deposit copies of the above Jurisdictional Statement in the United States Post Office at Augusta, Maine, first class postage prepaid, addressed to appellee's attorneys as follows: Henry N. Berry, III, Esq., 193 Middle Street, Portland, Maine, and Pierce B. Hasler, Esq., 68 High Street, Portland, Maine.

Dated: June 19, 1969.

JOHN W. BENOIT, JR.
Assistant Attorney General
State House
Augusta, Maine

Appendix A

"Any child committed to the center whose presence therein may be seriously detrimental to the well-being of the center, or who willfully and persistently refuses to obey the rules and regulations of said center may be deemed incorrigible, and upon recommendation of the superintendent may be transferred to a correctional center with the approval of the Commissioner of Mental Health and Corrections, provided that no child shall be transferred who is under 15 years of age. To so transfer, the superintendent shall certify that the child is incorrigible upon the mittimus in the case with the recommendation that transfer to the appropriate correctional center be effected. Upon approval by the Commissioner of Mental Health and Corrections, the transfer may be effected at any time. The superintendent of the correctional center shall receive and detain any person so transferred. The superintendent of the correctional center, solely, with respect to each transferee shall have all of the powers and duties prescribed for the superintendent of a training center under sections 2716 to 2718. A transferee's maximum term of commitment is not altered by transfer. Upon recommendation of the superintendent of the correctional center and the superintendent of the center, certified on the original mittimus, and certified to the Commissioner of Mental Health and Corrections, with reasons therefor, a transferee who in the opinion of the superintendent of the correctional center and the superintendent of the center has benefitted from the program at the correctional center, but is not ready for return to the community, and whose needs can then be best served by the program at the training center, may be returned thereto. Return of a transferee to a training center shall divest the superintendent of the correctional center of all powers and duties with respect to such transferee, and shall revest all of such authority in the superintendent of the training center. (As amended by **P. L. 1967, c. 195 § 2.**)

Appendix B

UNITED STATES COURT OF APPEALS

For the First Circuit

No. 7161

MICHAEL EDWARD SHONE,
PETITIONER, APPELLANT,

v.

STATE OF MAINE ET AL.,

RESPONDENTS, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

Before ALDRICH, *Chief Judge*,
STALEY* and COFFIN, *Circuit Judges*.

Henry N. Berry, III, and *Pierce B. Hasler* for appellant.
John W. Benoit, Jr., Assistant Attorney General, with whom *James S. Erwin*, Attorney General, was on brief, for appellees.

January 31, 1969.

STALEY, *Circuit Judge*. After exhausting state remedies, appellant, Michael Edward Shone, petitioned the district court for a writ of habeas corpus alleging that he was confined in the Men's Correctional Center, South Windham, Maine, (hereinafter "Correctional Center"), in violation of the due process and equal protection provisions of the 14th Amendment to the Federal Constitution. The district court found no such violation and dismissed the petition. *Shone v. State of Maine*, 286 *F. Supp.* 511 (D.C. Me., 1968). This appeal followed.

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* Of the Third Circuit, sitting by designation.

Appellant was adjudged a juvenile offender on May 15, 1967, by a Maine juvenile court and was ordered committed to the Boys Training Center (hereinafter "Training Center") pursuant to Me. Rev. Stat. Ann., tit. 15, sec. 2611(4) (B), for the term of his minority unless sooner discharged by the superintendent, Me. Rev. Stat. Ann., tit. 15, sec. 2714.[1] Shortly after his commitment to the Training Center, administrators of that institution deemed appellant incorrigible, and on or about May 28, 1967, he was transferred, at the age of fifteen, to the Men's Correctional Center[2] in

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[1]Section 2714, as amended, (Supp. 1967), provides in part:

> "A boy between the ages of 11 and 17 may be committed to the Boys Training Center * * *. All commitments of such children shall be for the term of their minority, unless sooner discharged by the superintendent * * *."

The general purpose of establishing the Training Center is explicated in Me. Rev. Stat. Ann., tit. 15, sec. 2712, as amended, (Supp. 1967), wherein it is declared:

> "The State shall establish and maintain training centers to rehabilitate children committed thereto as juvenile offenders by the courts of the State. Toward this end, the disciplines of education, casework, group work, psychology, psychiatry, medicine, nursing, vocational training and religion related to human relations and personality development shall be employed * *"

[2]At the time of appellant's transfer, the Correctional Center was called the Men's Reformatory. Its name was changed shortly after the transfer by Me. Rev. Stat. Ann., tit. 34, sec. 801 (Supp. 1967). This same statute also sets out the general purpose of the Correctional Center and specifies those that can be committed to it. It provides in part:

> "The Men's Correctional Center, formerly called the Reformatory for Men, located at South Windham, shall be maintained for the confinement and rehabilitation of:
>
> "1. *Males between 16 and 17 years of age.* Males over the age of 16 years and under the age of 17 years committed thereto after being adjudicated by the juvenile court to have committed juvenile offenses;
>
> "2. *Males over 15 years of age.* Males over the age of 15 years determined in accordance with Title 15, section 2717 to be incorrigible while under commitment to the Boys Training Center;
>
> "3. *Males over 17 years of age.* Males over the age of 17 years and under the age of 36 years who have been convicted of or who have pleaded guilty to, crimes in the courts of the State, and who have been duly sentenced and committed thereto.
>
> "All of the males specified in subsections 1, 2 and 3 shall be detained and confined in accordance with the orders or sentences of the courts and rules and regulations of the center applicable to each such category. The provisions for the safekeeping or employment of such inmates shall be made for the purpose of teaching

accordance with Me. Rev. Stat. Ann., tit. 15, sec. 2717, which provided in pertinent part:[3]

> "Any child committed to the center whose presence therein may be seriously detrimental to the well-being of the center, or who willfully and persistently refuses to obey the rules and regulations of said center may be deemed incorrigible, and upon recommendation of the superintendent may be transferred to a reformatory with the approval of the Commissioner of Mental Health and Corrections, but no child shall be transferred under the age of 15. To so transfer, the superintendent shall certify that the child is incorrigible upon the mittimus in the case with the recommendation that transfer to the appropriate reformatory be effected. Upon approval by the Commissioner of Mental Health and Corrections, the transfer may be effected any time thereafter. It shall be the duty of the officers of the reformatory to receive any person so transferred and the remainder of the original commitment shall be executed at the reformatory, except that in the event a child so transferred has, in the opinion of the superintendent of the reformatory and of the superintendent of the center, benefited from the program at the reformatory, to such an extent that return to the center would be in the best interest of the child and of the community, such child may be returned to the center. * * *"

In *Baxstrom* v. *Herold*, 383 U.S. 107 (1966), the Supreme Court decided that Baxstrom, a prisoner who had been placed in a mental hospital while serving his time, was denied equal protection of the laws by the operation of a New York statutory procedure whereby

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such inmates a useful trade or profession, and improving their mental and moral condition. * * *" Me. Rev. Stat. Ann., tit. 34, Sec. 801 (Supp. 1967).

[3]The transfer statute was repealed and replaced effective October 7, 1967, to reflect in part the change in names referred to in note 3, *id.* Other changes in the text of the statute have no material bearing on the disposition of this appeal. See Me. Rev. Stat. Ann., tit. 15, Sec. 2717 (Supp. 1967)

he was: (1) civilly committed to a mental institution at the expiration of his sentence without the jury review available to all others civilly committed; and (2) administratively transferred, in effect, from a civil mental hospital to a functionally distinct institution for the dangerously insane without the judicial determination that he was dangerously mentally ill such as that afforded to all others so committed, except those about to terminate a prison sentence.[4] Appellant contends that under the Court's holding in *Baxstrom* he was denied equal protection of the laws because he was transferred to the functionally distinct Correctional Center pursuant to a statute that did not provide for a judicial hearing, while those youths who were not in the Training Center's custody were committed to the Correctional Center only after a statutorily mandated judicial hearing.[5] Similar arguments have proven persuasive in other recent cases.

In *Bolton* v. *Harris*, 395 F.2d 642 (C.A.D.C. 1968), petitioner, who had successfully pleaded not guilty to a crime by reason of insanity, argued that he was denied equal protection of the laws because he was committed to a mental institution without benefit of the protections afforded those civilly committed under the District of Columbia's Hospitalization of the

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[4]Baxstrom was not actually physically transferred from one hospital to another. Following the expiration of his prison sentence he remained at Dannemora State Hospital, an institution for the dangerously insane under the control and jurisdiction of the New York Department of Correction. However, at the termination of his sentence he would have been placed in a civil mental hospital under the jurisdiction and control of the Department of Mental Hygiene had not officials of the latter department decided *ex parte* that he was too dangerous for a civil mental hospital. Conceptually, therefore, and at least on paper, Baxstrom was transferred from a civil mental hospital to a criminal-type hospital by an unreviewable decision of the Department of Mental Hygiene.

[5]Juveniles not transferred from the Training Center are committed to the Correctional Center pursuant to Me. Rev. Stat. Ann., tit. 15, Sec. 2611 (4) (A) (Supp. 1967), and Me. Rev. Stat. Ann., tit. 34, Sec. 801 (Supp. 1967).

As in *Baxstrom*, there is no question here that the Training Center and the Correctional Center differ sharply in the treatment and privileges accorded their respective occupants. In fact, it appears from our reading of the Maine Supreme Judicial Court's opinion in *Shone* v. *State*,

Mentally Ill Act of 1964.[6] The court reasoned that since *Baxstrom* decided that an individual's past criminal conduct, standing alone, did not give rise to a presumption of dangerousness which would justify substantially different commitment procedures and confinement conditions for the mentally ill, it was likewise impermissible to provide "radically different procedures for patients acquitted by reason of insanity and for civilly committed patients."[7] 395 F.2d at 650. Previously, the same court had held, relying upon *Baxstrom*, that it was unlawful to commit to a mental institution in a manner different from those committed under the Hospitalization of the Mentally Ill Act one who was involuntarily found not guilty by reason of insanity. *Cameron* v. *Mullen*, 387 F.2d 193 (C.A.D.C. 1967).

And in *People ex rel. Goldfinger* v. *Johnston*, 53 Misc. 2d 949, 280 N.Y.S.2d 304 (Sup. Ct. 1967), the New York Supreme Court was confronted with a factual situation strikingly analogous to that presented here. There, the petitioner was sentenced to an indeterminate term at a correctional school. He was event-

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237 A.2d 412 (Me. 1968), that the Correctional Center is recognized as being functionally different from the Training Center. At page 415 the court stated:

> "We do recognize that the instant transfer from the Boys Training Center to the Reformatory for Men is *not on the same level as transfers from the Reformatory to the State Prison.* (Emphasis added.) The Center in the eyes of the Legislature was not meant to be considered as a penal institution. The State is directed to establish and maintain centers to *rehabilitate* boys between the ages of 11 and 17 committed thereto as juvenile offenders. * * * The superintendent * * * is given all the power which a guardian has over his ward and all the powers which parents have over their children *as to the person*, property, earnings *and rehabilitation* of every child committed to the center. (Emphasis in original.) * * * See, in contrast thereto, 34 M.R.S.A. Sec. 1501, wherein the Reformatory is defined as a correctional institution and the State Prision as a penal institution."

For further information regarding treatment and facilities afforded youths at the Training Center, *see* Note, Facts and Law of Inter-Institutional Transfer of Juveniles, 20 Me. L. Rev. 93 (1968) (hereinafter "Maine Law Review Note").

[6]D.C. Code Sections 21-501 to 21-591.

[7]Substantially the same result was reached by the New York Court of Appeals in a similar factual situation. *People* v. *Lally*, VT N.Y.2d 27, 277 N.Y.S.2d 654 (1966).

ually paroled, but was returned to the school as a parole violator. Five years later, he was administratively transferred to an institution for defective delinquents without receiving the notice and hearing granted under New York law to others adjudged dangerous mental defectives.[8] The court held that *Baxstrom* and *Specht* v. *Patterson*, 386 U.S. 605 (1967), required issuance of the habeas corpus writ, but managed to preserve the constitutionality of the administrative transfer statute by reading into it, *inter alia*, provisions for notice and hearing.[9]

In *Specht*, *supra*, petitioner was convicted for indecent liberties under one Colorado statute, but sentenced to an indefinite sentence under another (the Colorado Sex Offenders Act). Petitioner argued that he had been denied due process because the trial court's critical new finding as to whether he constituted a threat of bodily harm to the public, or was an habitual offender and mentally ill, had been made without a hearing and on the basis of hearsay evidence to which he did not have access. The Court agreed, noting:

> "The Sex Offenders Act does not make the commission of a specified crime the basis for sentencing. It makes one conviction the basis for commencing another proceeding under another Act to determine whether a person constitutes a threat of bodily harm to the public, or is an habitual offender and mentally ill. That is a *new finding of fact * * * that was not an ingredient of the offense charged.* The punishment under the second Act is criminal punishment even though it is designed not so much as retribution as it is to keep individuals from inflicting future harm. * * * " 386 U.S. at 608-09. (Emphasis added.)

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[8] Mental Hygiene Law Sec. 135 (McKinney).

[9] The court read into the transfer statute, Correction Law Sec. 430 (McKinney), all of the procedural safeguards provided in Sec. 135 of the Mental Hygiene Law.

In the instant case, as in *Specht*, the fact (incorrigibility) that controlled appellant's ultimate fate (transfer to the Correctional Center) was no part of the original adjudication as to whether he was a juvenile offender.[10] Instead, he was subjected to a new decision by a new decision-maker on the basis of conduct committed after his placement in the Training Center.[11] Standing alone, this new finding of incorrigibility may not have been violative of constitutional rights; but when solely on the basis thereof, and without benefit of those procedural safeguards enjoyed by young boys not transferred from the Training Center, appellant was committed to the concededly "functionally distinct" Correctional Center, he was denied due process and equal protection of the law.[12]

The Supreme Court in *Baxstrom* realized that petitioner therein might well require treatment in a criminal-type hospital, but stated that it was unconstitutionally arbitrary to allow state administrators to determine *ex parte* whether those nearing the end of a penal sentence were too dangerous for a civil hospital when the same issue was judicially determined for non-prisoners. Thus, where judicial procedures exist for determining the suitability issue for one class, a less fair process cannot be substituted merely because one is in the custodial care of the state. In the present case we do not dispute the possibility that appellant may be

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[10]There is still much to be learned in the area of behavioral science, but at least we have come far enough to know that one instance of breaking, entering, and committing larceny (appellant's offense) does not indicate that the offender will be unresponsive to enlightened and humane treatment.

What might be considered more reasonable presumptions than the one in issue here were struck down in *Baxstrom* and *Specht*. In *Baxstrom*, it was improperly presumed that one nearing the end of a prison sentence and who had proven criminal tendencies by virtue of past criminal conduct was too dangerous for a civil mental hospital. 383 U.S. at 114. In *Specht*, it was improperly presumed that one convicted of indecent liberties constituted a threat to the public. 386 U.S. at 607-08. *See Bolton* v. *Harris*, 395 F.2d 642, 650, n. 45 (1968).

[11]Those factors which are considered in determining the incorrigibility of a boy are discussed in the Maine Law Review Note at 106-110.

[12]*See* note 5, *supra*. The district court also conceded the functional differences between the Training Center and Correctional Center. 286 F. Supp. at 515.

unsuited for the permissive milieu of the Training Center, or that his presence in the institution might be "seriously detrimental to the well-being of the center," Me. Rev. Stat. Ann., tit. 15, Sec. 2717, for he may indeed be incorrigible and require placement in the stricter environment of the Correctional Center; but we think it constitutionally impermissible for state officials to determine *ex parte* this issue as to him, when the same issue is judicially decided for all those not in the Training Center's custody. Under Maine's statutory scheme, a member of the latter class may be committed to the Correctional Center only after a judicial hearing and decision, Me. Rev. Stat. Ann., tit. 15, Sec. 2611 (4)(A) (Supp.), which decision is subject to a full *de novo* judicial review, Me. Rev. Stat. Ann., tit. 15, Sections 2661(2) to 2666, with the further right to appeal to the Maine Supreme Court. Me. Rev. Stat. Ann., tit. 15, Sec. 2667. Benefit is also derived from the full measure of procedural safeguards enumerated in *In re Gault*, 387 U.S. 1 (1967). *Baxstrom* and *Specht* require that substantially the same procedural protections be extended to a juvenile committed to the Training Center before he can be lawfully transferred to a functionally distinct institution on the basis of a critically new finding of fact.[13]

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[13] We think the necessity for counsel's presence at the transfer proceeding is just as compelling as the need for counsel at revocation of probation proceedings required by *Mempa* v. *Rhay*, 389 U.S. 128 (1967). Me. Rev. Stat. Ann., tit. 15, Sec. 2717 (Supp. 1967), provides in part:

> "* * * Upon recommendation of the superintendent of the correctional center and the superintendent of the center * * * a transferee who in the opinion of the [two superintendents] * * * has benefitted from the program at the correctional center, but is not ready for return to the community, and whose needs can then be best served by the program at the training center, may be returned thereto. * * *"

Obviously, when deciding whether an individual "has benefitted from the program at the correctional center," findings relative to his present behavior will necessarily be measured against the initial findings that caused his removal from the Training Center. Because of the part played by these initial findings in retransfer decisions, it will be beneficial to have "the aid of counsel in marshaling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the defendant to present his case * * *." 389 U.S. at 135.

The state contends, *inter alia*, that *Baxstrom* does not apply to factual situations where there is no extension of sentence.[14] With this we cannot agree. It is our view that even if Baxstrom had been properly committed to a civil mental hospital following the expiration of his sentence, the Court would have nevertheless invalidated his transfer to a functionally distinct institution if it was based, as it was, on a proscribed presumption and an arbitrary classification.

It is next argued that the judgment of the district court should be affirmed because the transfer statute in question was enacted before appellant's committal to the Training Center, and therefore the committal must be held to have been pronounced subject to the provisions of the transfer statute.[15] This argument can be of no comfort to the state because we have already held that application of those very provisions denied appellant due process and equal protection of the laws. The more difficult question is whether we can read into the statute, as did the courts in *Bolton* v. *Harris*, *supra*, and *People ex rel. Goldfinger* v. *Johnston*, *supra*, those procedural protections that would save its constitutionality. This we might be inclined to do were it not for the statement of the Supreme Judicial Court of Maine in *Shone* v. *State*, 237 A.2d 412, 414 (Me. 1968), that:

> "The transfer statute, 15 M.R.S.A. Sec. 2717, as can readily be observed, does not expressly provide either for notice and hearing at the hands of the administrative officials *nor does it intimate*

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[14] This same contention appears to have been considered by the Court of Appeals for the District of Columbia in *Cameron* v. *Mullen*, 387 F.2d 193, 201 (C.A.D.C. 1967), wherein the court emphasized:

> "* * * The Supreme Court struck down the New York system not because Baxstrom was reaching the end of his sentence, but because it held dangerousness is not relevant to the *procedures* for determining whether a 'person is mentally ill *at all*.'" (Emphasis in original.)

[15] Among those cases that have embraced this position are: *Rich* v. *Chamberlain*, 104 Mich. 436, 62 N.W. 584 (1895); *State ex rel. Kelly* v. *Wolfer*, 119 Minn. 368, 138 N.W. 315 (1912); *Petition of Cassidy*, 13 R.I. 143 (1878); and *Uram* v. *Roach*, 41 Wyo. 335, 37 P.2d 793 (Wyo. 1934).

even by implication any requirement of court approval. * * *" (Emphasis added.)

In view of the above statement so recently made by Maine's highest court, we think that proper regard for our Federal system precludes us from reading into the statute — even to prevent its demise — that which the Maine Supreme Judicial Court said was not impliedly there.

After carefully considering all the contentions advanced by the state, we have concluded that the district court erred in not granting the writ. Accordingly, the judgment of the district court will be vacated and the cause will be remanded to that court with instructions to grant the writ of habeas corpus returning appellant to the Training Center.

UNITED STATES DISTRICT COURT
District of Maine
Southern Division

Petition for Writ
of Habeas Corpus
Civil No. 10-54

MICHAEL EDWARD SHONE,
PETITIONER

vs.

STATE OF MAINE AND
MERTON JOHNSON, SUPERINTENDENT,
MAINE STATE CORRECTIONAL CENTER,
RESPONDENTS

OPINION AND ORDER OF THE COURT

GIGNOUX, J.

This is a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 (1964), *et seq.* The question presented is the constitutional validity of the Maine statutory procedure under which petitioner, a juvenile offender, was administratively transferred from a state juvenile institution to an adult reformatory. The Court holds that the transfer infringed no constitutional right of petitioner, and therefore denies the writ.

Petitioner, Michael Edward Shone, is presently confined at the Maine State Men's Correctional Center, South Windham, Maine. On May 15, 1967, the Ninth District Court of Maine, Division of Southern Cumber-

land, found after hearing that petitioner, aged 15, had committed a juvenile offense by reason of his breaking, entering, and committing larceny at the Blue Moon Cafe, Portland. The court ordered pursuant to 15 M.R.S.A. § 2611(4B) (1964) that petitioner be committed to the Boys Training Center at South Portland for the term of his minority "unless sooner discharged or otherwise disposed of by law." *See* 15 M.R.S.A. § 2714 (1964). Petitioner did not appeal either the finding that he had committed the offense or the disposition of his case, *see* 15 M.R.S.A. §§ 2261(2), 2665 nor does he here contend that his constitutional rights were in any way impaired by the procedures employed at his juvenile hearing.

Nine days after being committed to the Boys Training Center, petitioner was deemed to be incorrigible by the administrators of the Training Center and a request was made to transfer petitioner to the Correctional Center.[1] On or about May 28, 1967 after the approval of the Maine Commissioner of Mental Health and Corrections had been obtained, petitioner was administratively transferred to the Correctional Center in accordance with the procedure specified by 15 M.R.S.A. § 2717 (1964).

Petitioner sought post-conviction relief in the courts of the State of Maine under 14 M.R.S.A. § 5501 (1964), *et seq.*, on the same ground as is alleged here, namely that the statute and procedure pursuant to which he was administratively transferred from the Training Center to the Correctional Center are unconstitutional under the Sixth and Fourteenth Amendments to the Federal Constitution. His petition was denied by the single justice and the denial was affirmed by the Supreme Judicial Court of Maine. *Shone* v. *State*, 237 A.2d 412 (Me. 1968). Petitioner thereupon filed his present petition in this Court. He has been permitted to proceed in forma pauperis and has been represented by counsel of his own choice. It is conceded

[1]At the time the transfer was made the Men's Correctional Center was called the Men's Reformatory. The name was changed shortly thereafter. *See* 34 M.R.S.A. § 801 (1967 Supp.).

that petitioner has exhausted his available state remedies as required by 28 U.S.C. § 2254 (1964), and the parties have stipulated that his right to habeas relief be determined, without a further evidentiary hearing, upon the record of his post-conviction proceedings in the state courts.

The sole ground asserted by petitioner in support of his petition is that he was denied due process of law and the equal protection of the laws guaranteed to him by the Constitution of the United States by his administrative transfer from the Boys Training Center, to which he had been committed, to the Men's Correctional Center, in which he is now confined. He contends that 15 M.R.S.A. § 2717, insofar as it permits the transfer of an inmate of the Boys Training Center to the Men's Correctional Center without at least some procedural safeguards such as a judicial hearing, the right to counsel, and the right to confront and cross-examine witnesses is unconstitutional and void.

At the time petitioner's transfer was effected, 15 M.R.S.A. § 2717 (1964) provided,[2]

> Any child committed to the center whose presence therein may be seriously detrimental to the well-being of the center, or who willfully and persistently refuses to obey the rules and regulations of said center may be deemed incorrigible, and upon recommendation of the superintendent may be transferred to a reformatory with the approval of the Commissioner of Mental Health and Corrections, but no child shall be transferred under the age of 15. To so transfer, the superintendent shall certify that the child is incorrigible upon the mittimus in the case with the recommendation that transfer to the appropriate reformatory

[2] 15 M.R.S.A. § 2717 was amended by Laws of Maine, 1967, ch. 391 § 2 effective Oct. 7, 1967 in a manner not pertinent to the present case. *See* 15 M.R.S.A. § 2717 (1967 Supp.)

> be effected. Upon approval by the Commissioner of Mental Health and Corrections, the transfer may be effected any time thereafter. It shall be the duty of the officers of the reformatory to receive any person so transferred and the remainder of the original commitment shall be executed at the reformatory, except that in the event a child so transferred has, in the opinion of the superintendent of the reformatory and of the superintendent of the center, benefited from the program at the reformatory, to such an extent that return to the center would be in the best interest of the child and of the community, such child may be returned to the center. The reason for such return shall be certified by the recommending superintendents on the mittimus and certification of the return shall be made by the recommending superintendents to the Commissioner of Mental Health and Corrections, giving their reasons therefor.

Petitioner does not contend that his transfer was not properly accomplished under this section, but confines his attack to the constitutionality of the statute itself.

Although the United States Supreme Court has not yet had occasion to pass upon the precise issue which petitioner here raises, the great weight of state and lower federal authority sustains the constitutionality of administrative inter-institutional transfer statutes similar to the one here involved. *See Shone* v. *State, supra; Wilson* v. *Coughlin*, 147 N.W. 2d 175 (Iowa 1966); *Long* v. *Langlois*, 170 A.2d 618 (R.I. 1961); *Sonnenberg* v. *Markley*, 289 F.2d 126 (7th Cir. 1961); *Arkadiele* v. *Markley*, 186 F. Supp. 586 (S.D. Ind. 1960); *Trimble* v. *Stone*, 187 F. Supp. 483, 486 n. 2. (D.D.C. 1960) (dictum); *Clay* v. *Reid*, 173 F. Supp. 667 (D.D.C.) *appeal dismissed*, 272, F.2d 527 (D.C. Cir. 1959); *Suarez* v. *Wilkinson*, 133 F. Supp. 38

(M.D. Pa. 1955); *People* v. *Scherbing*, 209 P.2d 796 (Cal. Dist. Ct. App. 1949); *Moffett* v. *Hudspeth*, 198 P. 2d 153 (Kan. 1948); *In re Robertson*, 54 A.2d 848 (Del. Gen. Sess. 1947); *Uran* v. *Roach*, 37 P.2d 792 (Wyoming 1934); *Sheehan, Petitioner*, 254 Mass. 342 (1926); *In re Schiavone*, 183 N.Y.S. 884 (Sup. Ct. 1920); *Stagway* v. *Riker*, 86 Atl. 440 (N.J. Sup. Ct. 1913); *Cassidy, Petitioner*, 13 R.I. 143 (1880). *But see United States* v. *Hegstrom*, 178 F. Supp. 17 (D. Conn. 1959); *White* v. *Reid*, 125 F. Supp. 647 (D.D.C. 1954) and 126 F. Supp. 867 (D.D.C. 1954); Mills, "*Juvenile Delinquency—Also a Federal Problem*," 49 ABA Journal 44, 46-47 (1963); Note, *Facts and Law of Inter-Institutional Transfer of Juveniles*, 20 Me. L. Rev. 93 (1968).[3]

The question now is whether this authority is still valid in light of four recent Supreme Court decisions on different, but related questions: *Mempa* v. *Rhay*, 389 U.S. 128 (1967); *In re Gault*, 387 U.S. (1967); *Specht* v. *Patterson*, 386 U.S. 605 (1967); *Baxstrom* v. *Herold*, 383 U.S. 107 (1966). Petitioner urges that these decisions make it clear that a statute which provides for the transfer of an inmate of a juvenile institution to a "functionally different" institution without a judicial finding of fact to support the transfer and without traditional constitutional safeguards deprives the inmate of due process and equal protection of the laws. This Court, while acknowledging the impact of these decisions in their respective and distinct fields,

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[3] In United States v. Hegstrom, *supra*, and *White* v. *Reid*, *supra*, the courts ruled that juvenile offenders committed to a juvenile institution under either the federal or District of Columbia juvenile act could not constitutionally be transferred to a penal correctional institution since juvenile court proceedings are "not criminal in nature" and a later transfer to a penal institution is "to permit confinement for crime without a right to trial." United States v. Hegstrom, *supra* at 19, 20. *See* White v. Reid, *supra*, 125 F. Supp. at 649, 126 F. Supp. at 870-871. The constitutional infirmity found to exist in these cases was not in the transfer procedures themselves, but in the non-criminal character of the initial juvenile proceedings. These holdings would seem to be at least partly vitiated by In re Gault, 387 U.S. 1 (1966), where the Supreme Court held that a juvenile may not be committed for a juvenile offense to any type of institution without the traditional criminal constitutional safeguards. It must be here reiterated that in the present case petitioner makes no contention that any of these safeguards were lacking at his juvenile proceeding.

does not feel that they require that the procedure set out in 15 M.R.S.A. § 2717 be struck down.

Petitioner's argument is two-pronged. First, he complains that he is deprived of the equal protection of the laws because under the transfer statute he is committed to the Correctional Center without a judicial proceeding, while other youths who are not in custody at the Training Center cannot be committed to the Correctional Center without at least a juvenile court hearing. Here he cites *Baxstrom* v. *Herold, supra,* which held that a procedure whereby an adult prisoner nearing the end of his sentence could be civilly committed for a period of time beyond the expiration of his prison term to a hospital for the criminally insane without the judicial determination available to a person not in custody, was a deprivation of equal protection of the laws in violation of the Fourteenth Amendment. But in *Baxstrom* the period of commitment was an extension of the term of the original criminal sentence imposed. In the present case the transfer does not prolong the period of confinement; it merely changes the environment in which the original judicially imposed commitment is to be served. The *Baxstrom* case would be apposite to this case only if the statute permitted an extension of the duration of the original commitment by virtue of the administrative transfer, which it clearly does not.[4] *Cf. Bolton* v. *Harris* —— F.2d —— (D.C. Cir. Feb. 16, 1968).

Petitioner's second contention is that the procedure under which he was transferred deprived him of due process of law in that a "critical finding" of a "new fact" which affected the type of petitioner's sentence was made administratively without the safe-

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[4]In fact, the procedure involved in the present case is more akin to the procedure by which Baxstrom had been transferred for the duration of his criminal sentence to a hospital for the criminally insane. The Court mentioned this transfer but did not intimate that the administrative transfer of a prison inmate to a functionally different institution for the duration of his original commitment, was constitutionally improper. 383 U.S. at 108. What the Court did invalidate was a procedure whereby Baxstrom was subjected to *further* confinement without the safeguards available to one not in custody.

guards of criminal judicial procedures. For this point he cites, *Specht* v. *Patterson*, *supra*, and *Mempa* v. *Rhay*, *supra*. In the *Specht* case, the Supreme Court ruled that a "sexual offender" statute under which a person convicted of a specific crime could be given an indeterminate sentence upon an ex-parte finding that the defendant was "a threat of bodily harm to members of the public or . . . an habitual offender and mentally ill" was unconstitutional as a deprivation of due process. The difference between the present case and *Specht* is that the sentence under the sexual offender statute was a considerable enhancement of the maximum sentence for the crime of which Specht had in fact been convicted while in the present case the original commitment is not being extended in any way. In *Mempa*, the Court found that due process requires that counsel be present at the time of sentencing where sentence has been deferred subject to probation. However there the alternatives were probationary freedom or confinement, and the sentencing court had to determine whether probation should be revoked and a prison sentence imposed.[5] Here, petitioner is already confined pursuant to a valid commitment, and the administrative determination only affects the locus in which his confinement is to take place.

Finally, petitioner calls the Court's attention to *In re Gault*, *supra*, as the deathknell of the *parens patriae* doctrine often cited in justification of special procedures for dealing with juvenile offenders. But petitioner is not attacking the constitutional sufficiency of his original juvenile proceedings,[6] nor does he maintain that a juvenile cannot be constitutionally committed to the Correctional Center in the first place. *See* 15 M.R.S.A. § 2611(4A) (1964). *But see United States* v. *Hegstrom*, *supra*.

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[5]In Mempa the Court also laid stress on the fact that under the applicable state law certain legal rights, notably the rights to appeal and to withdraw a guilty plea, might be lost if not exercised at the deferred sentencing hearing. 389 U.S. at 135-136.

[6]In Gault the Court expressly refrained from deciding what, if any, constitutional safeguards are required in pre-adjudication treatment and post-adjudication disposition of juvenile offenders. 387 U.S. at 31 n. 48.

As previously stated, petitioner makes no complaint that his original juvenile hearing was defective. He does not suggest that the provisions of the transfer statute were not complied with, nor does he charge arbitrary action or abuse of discretion by those responsible for his transfer. His sole attack is upon the constitutionality of a statute by which the Legislature of the State of Maine has vested in the Superintendent of the Training Center and the Commissioner of Mental Health and Corrections authority to transfer a juvenile offender from the Training Center to the Correctional Center when required for his welfare and the welfare of other inmates of the Training Center. Conceding that the Training Center and the Correctional Center are, as petitioner insists, functionally different institutions, it cannot be gainsaid that the essential aim of both institutions is the rehabilitation and return to society of the persons committed to their care and custody. *See* 15 M.R.S.A. §§ 2501 (1964), 2712 (1967 Supp.); 34 M.R.S.A. § 801 (1967 Supp.). To be sure, the methods employed at the Training Center in accomplishing this end are milder and more suited to young and impressionable boys than those utilized at the Correctional Center, which is given the task of reforming the older, less malleable youths and younger men. In fact, it is for this reason that the facilities of the Boys Training Center are not adequate for particularly obstreperous and intractable youths. Undoubtedly it is not desirable for a young boy to be kept in company with experienced criminals in a prison environment. However it is equally undesirable to have a disruptive and incorrigible youth hampering the program at a juvenile institution and exercising his unwholesome influence over the other boys there. In administering custodial and rehabilitative institutions, the state must have some latitude to determine what course of treatment is most appropriate for the individual inmate and to preserve discipline and protect the welfare of other inmates within its various institutions. The transfer provisions of 15 M.R.S.A. § 2717 are within this latitude, and the Court can find no constitutional defect in the procedure there outlined.

It is therefore ordered that the petition is *dismissed* and the writ *denied.*

Dated at Portland, Maine, this 19th day of June 1968.

/s/ EDWARD T. GIGNOUX
Judge, United States District Court

MICHAEL EDWARD SHONE

v.

STATE OF MAINE ET AL.

DUFRESNE, J.

Michael Edward Shone, age 15, on May 15, 1967 by judgment of the Juvenile Court for the Ninth District, Division of Southern Division, was adjudged to have committed a juvenile offense by reason of his breaking, entering and committing larceny at the Blue Moon Cafe, Portland, Maine and was ordered committed to the Boys Training Center (Center), under 15 M.R.S.A. § 2611, 4-B, for the term of his minority, unless sooner discharged by the superintendent. 15 M.R.S.A. § 2714. Transferred from the Center to the Reformatory for Men on or about May 28, 1967 under 15 M.R.S.A. § 2717 for incorrigibility, Shone sought relief from his alleged illegal imprisonment in post-conviction habeas corpus under 14 M.R.S.A. § 5502.

Petitioner contends that the permissive administrative transfer under 15 M.R.S.A. § 2717 without notice and hearing and without judicial approval was an invidious deprivation of his constitutional rights under both the State and Federal Constitutions. Constitution of Maine, Art. I, Section 6-A; Constitution of the United States, Amendment XIV, § 1. He claims specifically that the statute is unconstitutional as being in violation of the due process clauses of both constitutions and of the equal protection clause of the fourteenth amendment to the United States Constitution. The single Justice below ruled favorably on the constitutionality of the transfer statute and dismissed the petition. Appealing to this Court, petitioner will receive no greater satisfaction as we also find no merit in his constitutional attack.

Initially, let us pause to insert the fact that this appeal does not raise for our consideration any issue of abuse of discretion on the part of the authorities in the administration of the transfer statute, such as in-

sufficient factual reasons under the statute to justify the transfer order. Furthermore, petitioner concedes that, except for its alleged constitutional deficiency, his transfer from the Center to the Reformatory was statutorily proper.

The transfer statute, 15 M.R.S.A. § 2717, as can readily be observed, does not expressly provide either for notice and hearing at the hands of the administrative officials nor does it intimate even by implication any requirement of court approval. Certificate of incorrigibility and recommendation of the superintendent of the Center together with approval from the Commissioner of Mental Health and Corrections respecting the prospective transfer is all that is necessary. The statute in pertinent part reads as follows:

> "Any child committed to the center whose presence therein may be seriously detrimental to the well-being of the center, or who willfully and persistently refuses to obey the rules and regulations of said center may be deemed incorrigible, and upon recommendation of the superintendent may be transferred to a reformatory with the approval of the Commissioner of Mental Health and Corrections, but no child shall be transferred under the age of 15. *To so transfer, the superintendent shall certify that the child is incorrigible upon the mittimus in the case with the recommendation that transfer to the appropriate reformatory be effected. Upon approval by the Commissioner of Mental Health and Corrections, the transfer may be effected* any time thereafter. It shall be the duty of the officers of the reformatory to receive any person so transferred and the remainder of the original commitment shall be executed at the reformatory, except that in the event a child so transferred has, in the opinion of the superin-

> tendent of the reformatory and of the superintendent of the center, benefited from the program at the reformatory, to such an extent that return to the center would be in the best interest of the child and of the community, such child may be returned to the center." (Emphasis supplied)

In *Green* v. *Robbins*, 1962, 158 Me. 9, 176 A.2d 743, we viewed custodial transfer of inmates from the Reformatory to State Prison without further action of any court as within legislative competence, notice being taken that the original judgment and sentence were in no way changed or affected. Courts generally have held such administrative transfers within constitutional permissiveness, invading in no way any of the inmates' constitutional rights. Courts regard the possibility of transfer to the state penitentiary as an incident impliedly present in the reformatory sentence imposed by the court. The possibility of transfer must be read into, and becomes an integral part of, the reformatory sentence just as effectively as if set forth at length therein. The determination of the existing circumstances authorizing the transfer unless otherwise directed by the Legislature is properly delegated to institutional officers as an administrative duty and is no usurpation of judicial power. See, *Stagway* v. *Riker*, 1913, 84 N.J. Law 201, 86 A. 440; *Glazier* v. *Reed*, 1933, 116 Conn. 136, 163 A. 766; *Uram* v. *Roach*, 1934, 41 Wyo. 335, 37 P.2d 793; *Moffett* v. *Hudspeth*, 1948, 165 Kan. 656, 198 P.2d 153; *Tinsley* v. *Crespin*, 1958, 137 Colo. 302, 324 P.2d 1033; Annotation, 95 A.L.R. 1455.

We do recognize that the instant transfer from the Boys Training Center to the Reformatory for Men is not on the same level as transfers from the Reformatory to the State Prison. The Center in the eyes of the Legislature was not meant to be considered as a penal institution. The State is directed to establish and maintain centers to *rehabilitate* boys between the ages of 11 and 17 committed thereto as juvenile offenders.

15 M.R.S.A. §§ 2712, 2714. The superintendent in constant residence at the center, § 2712, is given all the power which a guardian has over his ward and all the powers which parents have over their children *as to the person*, property, earnings *and rehabilitation* of every child committed to the center. Section 2712 provides that in order to accomplish such intended purpose of rehabilitation of juvenile offenders *there shall be employed* "the disciplines of education, casework, group work, psychology, psychiatry, medicine, nursing, vocational training and religion related to human relations and personality development." See, in contrast thereto, 34 M.R.S.A. § 1501, wherein the Reformatory is defined as a correctional institution and the State Prison as a penal institution.

In *Wade* v. *Warden of State Prison*, 1950, 145 Me. 120, 73 A.2d 128, our Court has detailed the benevolent purposes which the Legislature had in mind when it established the modern treatment to be given to juvenile offenders.

> "He (the judge of a juvenile court) does not pass upon the crimes and misdemeanors of childhood wholly from the legal standpoint. The basic and primary idea of the legislature is salvation, not punishment. The nature of juvenile work is more philanthropic than the work of the common law jurist * * * * * In the past the fundamental idea of the law has been punishment and not reformation, but modern legislation recognizes that the treatment of a child should be correctional and rehabilitative rather than punitive. The child of today is the adult citizen of tomorrow and should be removed from the influence of improper environments and directed into the paths of rectitude by preventative and corrective means, if the next generation is to live in a peaceful and law abiding community. The immature must be given

> the chance to become the good citizen, or if necessary be forced to give up an immoral or criminal life. It is the welfare of the child and the State, that the statute is aimed to protect, *by exercising a parental control*, without the scar of the so-called criminal record. Unfortunately, it will be necessary at times to inflict punishment on the vicious or depraved, and this the statute recognizes." (Emphasis supplied)

Our transfer statute does recognize also that in certain circumstances sterner treatment and better security than are available in a training center for youthful offenders must replace the benevolent attitude initially displayed toward the juvenile delinquent. When a boy willfully and persistently refuses to obey the rules and regulations of the center or if his continued presence therein may seriously impair its well-being, the whole purpose of the juvenile law would be in jeopardy and the legislative goal completely frustrated, if administrative authorities in charge had not the power to remove such recalcitrant or offensive inmate. The statute permits expulsion of those who insist upon the disruption of the institution's program of education and rehabilitation, not so much as a measure of punishment to the individual youth, but rather as a device for the protection of the juvenile center itself in the interest and general welfare of all those who submit willingly and obediently to its humanitarian curriculum.

As stated in *Sheehan* v. *Superintendent of Concord Reformatory*, 1926, Mass., 150 N.E. 231, "(I)t would frustrate this general humanitarian scheme for the administration of the Industrial School for Boys if those not responsive to the reformative methods of the school must continue there in association with other boys yielding to its influences. Manifestly it would be within the power of the Legislature to provide for the segregation of such refractory inmates. There hardly could be question that in appropriate buildings more rigorous treatment and closer confinement might be

provided for such inmates as a part of the regular course of the school. No substantial reason is perceived why such segregation may not be accomplished also by transfer to another state institution adapted to the needs of such inmates."

As mentioned in *Wade*, supra, the State in administratively transferring a juvenile from the Center to the Reformatory is exercising parental control over the youngsters. It is under this doctrine of "parens patriae" that most authorities have adjudged similar statutes as our own transfer statute valid and constitutional against attacks such as raised herein that such legislation is a violation of the due process clauses of the state and federal constitutions and of the equal protection clause of the fourteenth amendment to the United States Constitution. Others have ruled transfers of unruly inmates from one institution to another to be an exercise of the State's police power. See *Sheehan*, supra; *Long* v. *Langlois*, 1961, 93 R.I. 23, 170 A.2d 618; *Harwood* v. *State*, 1947, 184 Tenn. 515, 201 S.W.2d 672; *Sonnenberg* v. *Markley*, 1961, U.S.C.A., 7th Cir., 289 F.2d 126; *Wilson* v. *Coughlin*, 1966, Iowa, 147 N.W.2d 175. Cf., *In re Rich*, 1966, Vt., 216 A.2d 266.

The petitioner decries his loss of certain substantial privileges to support his claim of deprivation of constitutional rights. True, at the Center a juvenile is not required to wear institutional garb; he is not under constant surveillance of guards; he is not confined within fenced or walled areas; he may leave the grounds to spend weekends at private homes; he may attend a public high school in the vicinity or be allowed to take courses at the University of Maine; he may travel throughout the state as part of the Center's athletic program or choir group. All these liberties vanish with his transfer to the Reformatory. But they are withdrawn for all juveniles transferred because of incorrigibility and thus the procedure is not offensive to the constitutional requirement of equal protection. As stated in *Duncan, Appl't* v. *Ulmer*, 1963, 159 Me. 266 at 279, 191 A.2d 617, at 624, privileges extended

an inmate of a State institution of necessity must be subordinated to the orderly administration of the institution, the presence of suitable facilities and other administrative considerations. These administrative concessions are within the discretion of the authority in charge and present no constitutional question.

While it is the decision of this Court that the plaintiff's direct attack upon the transfer statute must fail because such law merely sets up an administrative procedure to which the rules of constitutional due process are not applicable, nevertheless there are constitutional questions involved in the underlying initial juvenile proceedings which must be solved to assure the constitutionality of the transfer which depends upon them. Indeed, one's incarceration in the Reformatory by reason of transfer under 15 M.R.S.A. § 2717 would necessarily be tainted with illegality sufficient to support a post-conviction habeas corpus petition, if the required antecedent basic juvenile proceedings were void for invidious deprivation of constitutional safeguards of due process. True, the present petitioner has not shown that the application of the transfer statute as applied to him has resulted in the prejudice which he represents to be inherent in that law as an integral part of the juvenile law. He does concede that he had counsel representation at the juvenile court level and that he did not appeal from the court's decision that he had committed a juvenile offense with resulting commitment to the Center.

However, our Court has emphasized in *Sleeper, Applt.*, 1952, 147 Me. 302, 87 A.2d 115, quoting from *Bennett* v. *Davis*, 1897, 90 Me. 102 at page 105, 37 A. 864, that "(I)t is not what has been done, or ordinarily would be done under a statute, but what might be done under it that determines whether it infringes upon the constitutional right of the citizen. The constitution guards against the chances of infringement."

Our transfer statute provides for the removal of the juvenile to the Reformatory whether or not the juvenile was given an opportunity to be heard in the original proceedings which initiated his trip to the re-

formatory institution made available for incorrigibles. Under those circumstances, with a view of obviating later consideration of the constitutionality of the transfer statute in such settings as where commitments to the Center might be made without the application of certain constitutional safeguards, and also with due regard to the recent decisions of the Supreme Court of the United States respecting the application of constitutional requirements to juvenile proceedings, we consider it our duty to examine our juvenile law with the transfer statute integrated therein in the light of the law of the land, especially as determined in the case of In the matter of *Gault*, May 1967, 87 S.Ct. 1428, 387 U.S. 1.

There, the Supreme Court of the United States has ruled that the Due Process Clause has a role to play in juvenile proceedings and that the parens patriae doctrine cannot justify state action or legislation completely excluding juveniles from the constitutional scheme. It viewed the problem as one of ascertaining the precise impact of the due process requirement upon such proceedings. Even though *Gault* does not reject the concept of noncriminality in Juvenile Court proceedings, it does hold that the constitutional privilege of due process is applicable thereto and must be observed. It specifically concludes that the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parent must be given timely and adequate written notice of the specific charge or factual allegations to be considered at the hearing so that reasonable opportunity to prepare in defense may be had. It further holds equally essential for the determination of delinquency that the juvenile have the assistance of counsel and that the child and his parent must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child. Such constitutional strictures, we now hold, are applicable

to our juvenile proceedings, and thus we need not rely on any presumption of constitutionality to support the validity of our transfer statute.

That the due process concept applies in cases of deprivations of liberty other than in criminal cases is not new to this Court. In *Sleeper, Appellant*, 1952, 147 Me. 302, 87 A.2d 115, we recognized that due process of law was applicable to proceedings for commitments to mental hospitals. See, also *Opinion of the Justices*, 1955, 151 Me. 24 at 35, 117 A.2d 57. Similarly, we applied similar standards for commitments of vagrants to workhouses. *City of Portland* v. *City of Bangor*, 1876, 65 Me. 120.

The benevolent purposes intended by our statutes, 15 M.R.S.A. § 2501 et seq., to provide for our juvenile offenders that care, custody and discipline as nearly as possible approximating that which they should receive from their parents or guardians, and as far as practicable treatment commensurate with their status not as criminals but as young persons in need of aid, encouragement and guidance may still be obtained within the protective channels of due process. Such proceedings, we hold, remain civil in character, and the constitutional requirement of a jury trial, Constitution of Maine, Art. I, § 20, does not apply to them. See, *Ex parte Daedler*, 1924, 194 Cal. 320, 228 P. 467; *Wissenberg* v. *Bradley*, 1930 209 Iowa 813, 229 N.W. 205; Annotation, 67 A.L.R. 1082; 31 Am. Jur. Juvenile Courts, § 67; 50 C.J.S. Juries, § 80. But the due process directives as delineated in *Gault*, supra, are mandatory. *Marsden* v. *Commonwealth*, 1967, Mass., 227 N.E.2d 1. We need not at this time consider other constitutional issues raised and discussed in *Gault*. Our present treatment adequately disposes of the constitutional attack upon our transfer statute.

The petitioner concedes that he was deprived in no way of any of his constitutional rights in the juvenile court hearing which set the initial basis for his subsequent transfer from the Center to the Reformatory under administrative order, and therefore his appeal from

the single Justice's ruling dismissing his petition for habeas corpus must be denied. The entry will be

Appeal denied.

WILLIAMSON, C. J.
(did not sit)

State of Maine

Cumberland, ss.

SUPERIOR COURT

Civil Docket No. 67-600

MICHAEL EDWARD SHONE,

PETITIONER

v.

STATE OF MAINE, ET AL.

RESPONDENT

OPINION AND JUDGMENT

This post-conviction habeas corpus under 14 M.R.S.A. § 5502, et seq. came on for hearing on petition for motion to dismiss, and was argued by counsel.

The petitioner, 15 years of age, was transferred from Boys Training Center to the Reformatory for Men under 15 M.R.S.A. § 2717, which reads in part as follows:

> "Any child committed to the center whose presence therein may be seriously detrimental to the well-being of the center, or who willfully and persistently refuses to obey the rules and regulations of said center may be deemed incorrigible, and upon recommendation of the superintendent may be transferred to a reformatory with the approval of the Commissioner of Mental Health and Corrections, but no child shall be transferred under the age of 15. To so transfer, the

> superintendent shall certify that the child is incorrigible upon the mittimus in the case with the recommendation that transfer to the appropriate reformatory be effected."

It is not disputed that there was compliance with the statutory procedures.

Is 27 M.R.S.A. § 2717 constitutional? I answer in the affirmative. Counsel agree this is the sole issue.

The point is whether a transfer of a juvenile offender from the Boys Training Center to the Reformatory for Men in which males under 36 guilty of crime may be imprisoned violates the due process and equal protection clauses of the State and Federal Constitutions. Maine Constitution, Art. I, Section 6A; Federal Constitution, 14th Amendment. For my purposes I need consider only the Federal Constitution.

First: The immediate importance of the case to the petitioner for a ruling in effect determining whether he shall remain at the Reformatory, or shall be returned to the Training Center, makes it proper, in my opinion, for me sitting as a single Justice to pass on the constitutionality of the Act. I am fully aware of the principle stated by our Court in *Maine Milk Comm.* v. *Cumberland Farms*, 160 Me. 366, 367 (1964) as follows:

> "In the hearing below the single justice did not pass upon the constitutionality of the Maine Milk Commission Law. He felt obliged to presume that the law was constitutional in accordance with the well-established principle that the trial court was bound by the presumption of constitutionality."

Second: In my opinion the Act is constitutional. "A legislative act is presumed to be constitutional and this presumption remains until its repugnancy clearly appears, or is made to appear beyond a reasonable doubt." *Duncan, Appl't* v. *Ulmer*, 159 Me. 266, at 273,

Section 2717 is designed to meet the needs of the Training Center and the juveniles committed to the care of the State. The "incorrigible" boy is not, under the Act, to be allowed to harm the rest of the Center. That the institution to which such boy may be transferred at the age of 15 is a reformatory is not, in my opinion, unreasonable or improper in a constitutional sense.

The Supreme Court of the United States in the recent decision of Application of Gault, 87 S. Ct. 1428 (May 15, 1967) dealing with juvenile delinquency, did not pass upon the present problem. I do not consider that the constitutional standards therein set forth call for the destruction of our transfer system under Section 2717.

Cases upholding the constitutionality of such transfers are: *Sheehan* v. *Supt. of Reformatory*, 150 N.E. 231 (Mass. 1926); *Long* v. *Langlois* (R.I.) 170 A. 2d 618 (1961); *Wilson* v. *Coughlin* (Iowa) 147 N.W. 2d 175 (1966); *Sonnenberg* v. *Markley*, 289 F. 2d 126 (C.A.7 1961). Cases contra are: *In re Rich* (Vt.) 216 A. 2d 266 (1966); *U. S.* v. *Hegstrom* (Conn.) 178 F. Supp. 17 (1959). Now therefore, it is

ORDERED, that judgment be entered by the Clerk of Courts as follows: Motion to dismiss petition granted: petition dismissed.

Dated: July 11, 1967

ROBERT B. WILLIAMSON
Chief Justice,
Supreme Judicial Court

SUPREME COURT OF THE UNITED STATES

October Term, 1969.

MAINE ET AL. *v.* SHOVE.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 261. Decided October 13, 1969.

PER CURIAM.

The motion of the appellee for leave to proceed *in forma pauperis* is granted. The judgments of the United States Court of Appeals for the First Circuit and the United States District Court for the District of Maine are vacated and the case is remanded to said United States District Court with directions to dismiss the case as moot.